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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. **181**

JOHN FEDORA and JOHN LASKA,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF
ILLINOIS,

Respondents.

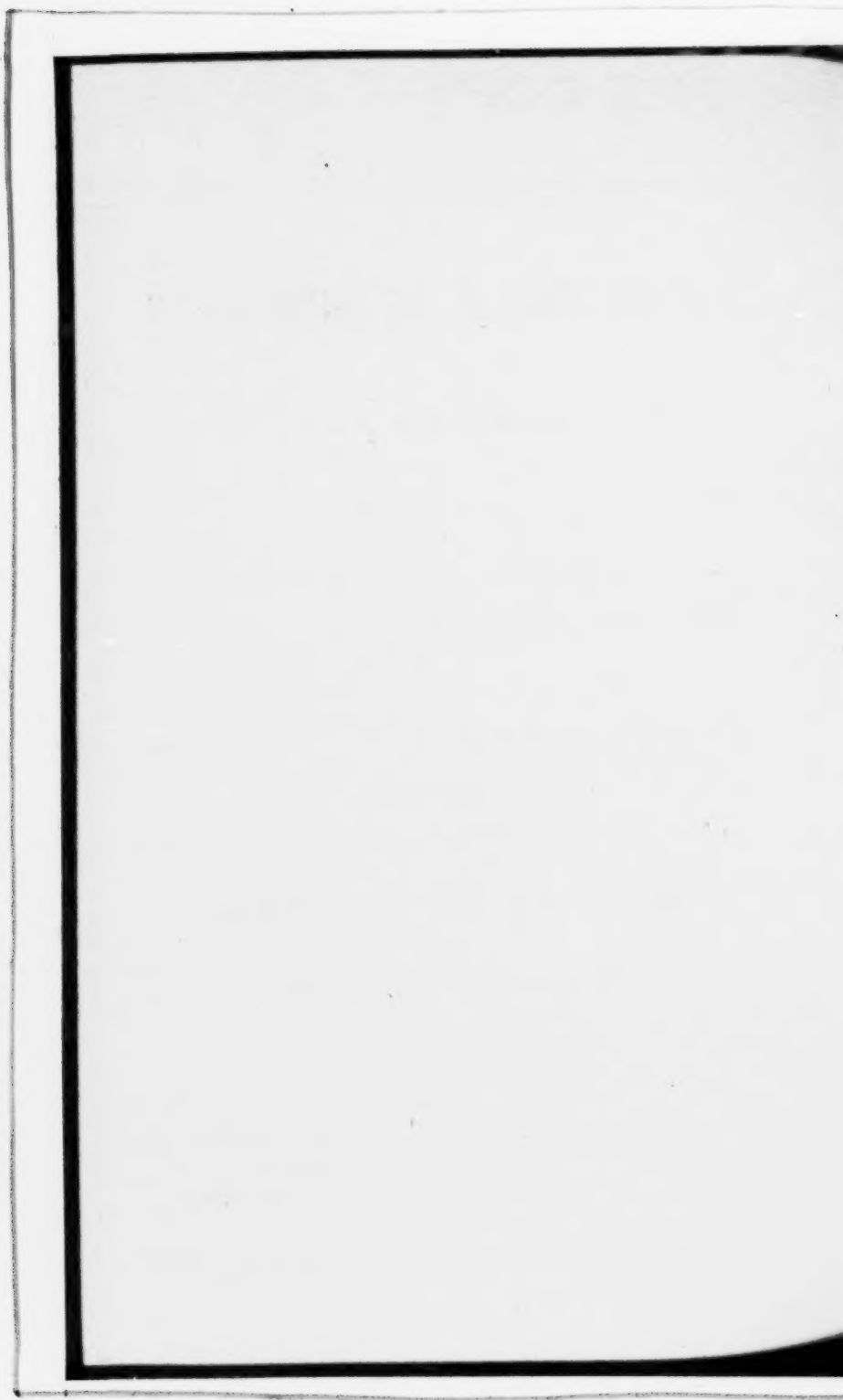
On Petition for
Writ of Certiorari
to the Supreme
Court of the State
of Illinois.

PETITION FOR WRIT OF CERTIORARI

and

BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Illinois entered in the above cause on January 23, 1946, which became final by reason of denial of petition for rehearing on March 14, 1946 (R. Vol. III, p. 24). Said judgment affirmed the judgment of conviction of the Macon County, Illinois, Circuit Court convicting petitioners of the crime of murder under Ch. 38, Ill. Rev. Stats. 1945, § 358, and sentencing them to life imprisonment pursuant to said Ch. 38, Ill. Rev. Stats. 1945, § 360.

SUMMARY.

This is a prosecution for murder commenced by indictment returned by the Grand Jury of the Circuit Court of Macon County, Illinois, on October 23, 1930 (Rec. Vol. 1, pp. 4-12). The case was tried to a jury and verdict was returned finding both petitioners guilty of murder and fixing their imprisonment in the penitentiary for the term of their natural life (Rec. Vol. 1, p. 26). Motions for new trial (Rec. Vol. 1, pp. 28-29) and in arrest of judgment (Rec. Vol. 1, p. 30) were filed and duly overruled (Rec. Vol. 1, p. 31). A bill of exceptions was in due course filed, marked, presented and approved in accordance with state law. This writ of error was sued out to the September Term, 1945, of the Illinois Supreme Court. A continuance was had to the November Term to permit counsel for respondents to finish his brief. The case was submitted on November 19, 1945, in the Supreme Court of Illinois and on January 23, 1946, the opinion of the court was filed. This opinion is contained in the record from pages 4 to 20 of Vol. III. A petition for rehearing was filed thereafter and in accordance with the Illinois practice, and at the next term of Court, the March Term, 1946, and on March 14, 1946, an order was entered denying the petition for rehearing (Rec. Vol. III, p. 24) and the judgment of the Illinois Supreme Court thereby became final. This application for certiorari is filed within ninety days of the order denying the petition for rehearing and is therefore in time. *Citizens Bank of Michigan City v. Opperman*, 249 U. S. 448, 39 S. Ct. 330, 63 L. Ed. 701.

Since this case was reviewed in the Supreme Court of Illinois on writ of error (the only manner for reviewing of felony cases under Illinois law) the common law period of limitations of twenty years from the date of judgment obtained, and although there was a considerable lapse of

time, the Supreme Court of Illinois properly recognized its jurisdiction to hear the case. *People v. Murphy*, 296 Ill. 532, 129 N. E. 868.

The opinion of the Illinois Supreme Court has been published, 393 Ill. 165, 65 N. E. (2d) 447, and may be found in this record at pages 4 to 20 of Vol. III.

STATEMENT OF THE CASE.

Petitioners were indicted in seven counts for the murder of Abel F. Price, in the Circuit Court of Macon County, Illinois, at the October Term, 1930. They have insisted they are innocent constantly since the time of their arrest. They were tried by a jury in the Circuit Court of Macon County and were found guilty by the jury and sentenced to imprisonment in the penitentiary for life.

Motions for new trial and in arrest of judgment were filed and overruled in due course (Rec. 28-31). Time for preparing and filing bill of exceptions was extended from time to time until twenty days from April 24, 1931 (Rec. 31, 35, 36). Bill of exceptions was, in due course, filed on May 14, 1931, marked presented, signed, sealed and approved (Rec. 489).

It will be necessary that we review the evidence, all of which was circumstantial, in detail. On the night of ~~January~~ *Janu* 4, 1931, Abel Price was employed by the Illinois Power and Light Company as a bus driver, in the City of Decatur, Macon County, Illinois. Sometime between 8:45 and 9:30 (Rec. 4, 51) on the evening of that date Abel Price was held up by two unidentified men who were riding in a small automobile, apparently, according to witnesses, a Ford (Rec. 4, 17, 49). The witnesses Manning and Richardson (Rec. 8, 19) described the man who did the shooting as about five feet four inches tall and weighing 140 pounds. The record indicates clearly that at the time of the trial of this case and at the time of the shooting, the

defendant Fedora was five feet eight inches tall and weighed 160 pounds (Rec. 303). The defendant Laska is, as a matter of fact, even larger. Throughout the record he is referred to as the "bigger one" or as the "larger one" (Rec. 173). This is the **only evidence** of identification and it is obviously insufficient.

The evidence showed that petitioners had rented a Ford automobile from the Drive-It-Yourself Agency in Decatur. The evidence further showed (Rec. 18) that Virgil E. Richardson had fired a shot at the fleeing car of Mr. Price's assailants. This shot was fired at a range of about a hundred feet with a .38 calibre Smith & Wesson revolver with a lead bullet (Rec. 19). This witness further stated: "The mark of the bullet would naturally show toward the front of the car" (Rec. 24). At the time he fired the shot Richardson "was not over twenty feet south of the car" (Rec. 24).

The testimony of the manager and an employee of the Drive-It-Yourself Agency from which the Ford automobile which petitioners had rented on the night in question (Rec. 111-123) showed that the car had a dent in it on the right hand side toward the back, approximately 18 inches back of the door and approximately 4 inches down on the body, approximately 6 inches above the center on the right side of the car. The dent was approximately the size of a quarter with a shiny area in the middle of it about the size of a dime or smaller. The dent was of a circular form.

One Arthur Dodwell testified (Rec. 133-164) that he was a friend of the petitioners and that he had obtained the car for them on the night in question, apparently because the credit of the petitioners at the Drive-It-Yourself Agency was not established whereas Dodwell's was. Dodwell testified that on the night in question the petitioners and he had done a great deal of drinking of home brew beer and that while the petitioners were drunk one

of them, John Fedora, had made some admissions to him tending to indicate that he (Fedora) had shot Abel Price. It should be noted in passing that Dodwell was indicted with petitioners but was never tried. Petitioners were in Warrensburg, Illinois, about twelve miles from Decatur (Rec. 173), sometime on the night of the shooting. According to witnesses for the prosecution, it was after the time of the shooting. According to witnesses for the defense it was before and at the time of the shooting.

The evidence showed that after he was shot Abel Price was not immediately killed, but was removed in an ambulance to the Decatur and Macon County Hospital where Dr. A. F. Goodyear was called to treat him. Dr. Goodyear testified (Rec. 60-92) that Mr. Price was lying on the table when the doctor arrived at the hospital, in a state of collapse and profound state of shock, accompanied by faintness, shortness of breath, pallor and feeble pulse. He had sustained a bullet wound through the right arm of a superficial nature, a bullet wound of the left thigh, also of a superficial nature, and a bullet wound about in the middle of the tenth rib on the right side between the mid-axillary and anterior line, right over the liver. The doctor had probed this latter bullet wound and had X-ray examinations made. Mr. Price went into a state of very severe shock and had to be revived with stimulants. The doctor testified (Rec. 63), "I thought he would die then."

Mr. Price responded to the stimulant, however. Further examination showed the bullet probably lodged in the region of the right kidney. Dr. Goodyear told Mr. Price that an operation would be necessary. Mr. Price requested that his appendix be removed because he had been having trouble with it (Rec. 65). Dr. Goodyear proceeded in the course of his exploratory operation to remove the appendix. He did not find the bullet. Mr. Price was apparently on the road to recovery from the operation and continued to do well for about three days. Seventy-two

hours after the operation a lot of abdominal distention with gas in the entire abdomen was noticed by Dr. Goodyear. It was accompanied by vomiting and impaired bowel action. Mr. Price continued to go downgrade with one rally on the fifth day. His condition was diagnosed by Dr. Goodyear as peritonitis (Rec. 73). His heart action became weaker after the seventh day. He died about 10:00 or 10:05 on the morning of the seventh day.

A post-mortem examination was performed by Dr. Milton Bohrod, and witnessed by Dr. Goodyear. The bullet was found during the post mortem, in the capsule of the kidney. There was a hematoma all around the bullet. According to Dr. Goodyear the inflammation had invaded the entire peritoneum. Dr. Goodyear testified over objections of petitioners that in his opinion death was due to peritonitis caused by a gunshot wound in the abdomen (Rec. 75).

Other evidence for the prosecution, which it is not necessary to summarize in detail, showed that petitioners had engaged in a great deal of home-brew beer drinking on the night of December 4th and the early morning of December 5th; that early in the morning of December 5th they went to Arthur Schwartz's house and got a tool to pound out a dent in the car Dodwell had rented for them. Dodwell was with them during most of the night and during the morning. The evidence also showed that a money changer identified as belonging to the deceased man was found by a boy at Steven's Creek. The petitioners admitted having been at some point on Steven's Creek during the course of the night, the record does not show where. The evidence for the prosecution also showed that the defendants paid for the beer and other items which they bought during the course of the night with nickels, dimes, and quarters; that the defendants had been seen in Warrensburg (Rec. 174) during that night; that Dodwell, Laska and Fedora were at a speakeasy operated by one Homer

Neil from approximately 11:30 until approximately 3 a. m. on the night of December 4th and the morning of December 5th.

Petitioners both testified that they had gotten Dodwell to obtain a Model "A" Ford coupe from the Drive-It-Yourself Agency; that they had driven around Decatur for some time in this car and had struck a truck a very light blow while in the downtown area of Decatur. Both defendants denied categorically that they had anything to do with the holdup or shooting of Abel Price. Evidence was offered and received to the effect that petitioners were in Warrensburg between 8:30 and 9:00 o'clock on the night in question, immediately before and perhaps at the time the evidence indicated Mr. Price was shot, and this evidence substantiated their account of their movements in every major detail.

Dr Milton Bohrod, a pathologist, performed the post mortem examination upon the deceased and his name was originally endorsed upon the indictment as a witness for the prosecution. He was called to testify on behalf of the defendants. He testified (Rec. 341-349) as to his findings in the post mortem examination; that Mr. price had received bullet wounds as testified to by Dr. Goodyear; that upon opening the abdomen the entire lining of the abdominal cavity, both the outside wall and the part that covers the intestines and hangs over free in the abdominal cavity were covered by flakes of material resembling pus; that the condition of peritonitis was not very old in this case; four or five days old or maybe a little older. The bowels and the stomach were very much distended with gas. The inside cat gut sutures used to close the incision were strained by the distention. No gas had escaped into the abdominal cavity from the intestines and there was no gas in the abdominal cavity. There were no perforations in the intestines; the only opening in the intestines being the site of the appendix, and this was closed by sutures.

There was strain on the sutures. While the sutures were gapping, they had not broken open. The doctor testified that it was medically impossible to tell whether the peritonitis had resulted from the gun shot wound or the operation for appendicitis. On cross-examination the doctor testified that although peritonitis could have resulted from the effect of the bullet, that in his judgment it "might not" have resulted from that.

Petitioners called twelve witnesses (Henry W. Roarick, Rec. 403; Walter A. Kresin, Rec. 405; Otto Kwasny, Rec. 408; Louise Besalke, Rec. 410; Archie Trueblood, Rec. 411; Emil Rinehold, Rec. 413; Max Malaski, Rec. 415; Minnie Hedeman, Rec. 417; George M. Gaddes, Rec. 419; Otto Schwalbe, Rec. 421; Joe Langfield, Rec. 433; and Gus Scharein, Rec. 424) to testify to their reputation in the community for good character. In each instance the witness testified, in substance, that he or she knew one or both of the defendants; resided within a few blocks of him or them; had known him or them for a period of years; and had seen the defendant or defendants regularly during that time. The Supreme Court of Illinois in its opinion (Rec. Vol. III, 13, 14) holds that under the law of Illinois this evidence laid sufficient foundation for the admission of testimony from each of these witnesses as to the reputation for good character of the defendant about whom the witness was testifying. The trial court, however, refused to allow these witnesses to testify further although a question which the Supreme Court holds in the opinion in this case (Rec. Vol. III, 13) to be a proper question was put to them. Our first allegation of error is based upon the failure of the Supreme Court of Illinois to declare harmful and prejudicial the refusal of the trial court to admit this testimony.

A number of instructions were given to the jury, both at the instance of the prosecution and at the instance of the defense (Rec. 449-482). In the Supreme Court of Illinois we urged that the instruction on page 457 of the Record

given at the instance of the prosecution was unconstitutional and denied petitioners the right to trial by jury. The Supreme Court of Illinois upheld us in this contention (Rec. Vol. III, 15) but the Supreme Court of Illinois said that since it elected to presume these defendants guilty, that a mere denial of trial by jury as guaranteed by the Constitution of the State of Illinois and the Constitution of the United States was harmless. Our second allegation of error in this Court is that for the Illinois Supreme Court so to rule, violated the Fourteenth Amendment, since in so ruling the Supreme Court of Illinois set up two standards of justice—a violation of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT AS TO JURISDICTION.

237-298 The jurisdiction of this court is invoked under section 298 of the Judicial Code as Amended by the Act of February 13, 1925 (U. S. C., Title 28, Section 344), since we complain that the action of the Supreme Court of Illinois in failing to reverse and remand for a new trial for the errors which it admits are in the record, to-wit, denial of the right to put on character witnesses, as guaranteed by the law of Illinois, and the denial of trial by jury, as guaranteed by the law of Illinois, violates the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States, and therefore petitioners are setting up rights, privileges and immunities claimed under the Constitution.

THE QUESTIONS PRESENTED.

1. The action of the trial court and of the Supreme Court of Illinois in denying petitioners the rights accorded to all other defendants in the State of Illinois to adduce the testimony of character witnesses was an arbitrary and unreasonable discrimination setting up two standards of justice—one for these petitioners, and one for all other

criminal defendants in the State of Illinois—in violation of the due process and the equal protection clauses of the Fourteenth Amendment.

2. Denial to these defendants of the right to trial by jury, as guaranteed to all defendants in the state, could not be harmless under the Fourteenth Amendment.

**REASONS RELIED UPON FOR ALLOWANCE
OF THE WRIT.**

1. The trial court and the Supreme Court of Illinois refused to give proper effect to the Fourteenth Amendment to the Constitution of the United States and refused to accord these defendants the procedures accorded to all other defendants in the state, thereby making an arbitrary and unreasonable classification against these petitioners.

2. The decision of the Supreme Court of Illinois in holding that the trial court's instruction that the jury were judges of the law and facts is unconstitutional under the law of the State of Illinois, and it was error for the Supreme Court of Illinois to hold that such instruction was harmless and is contrary to Amendment Fourteen of the Constitution of the United States.

3. The ruling of the Supreme Court of Illinois that the instruction is harmless is contrary to the ruling of this court in *Bollenbach v. United States*, 90 L. Ed. 318 (1946).

Wherefore, your petitioners pray that this petition for certiorari to review the judgment of the Supreme Court of Illinois herein be granted.

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Attorney for Petitioners.

Dated:

St. Louis, Missouri, June 10, 1946.

SUPREME COURT OF THE UNITED STATES.

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BRIEF IN SUPPORT OF PETITION.

OPINION BELOW.

The opinion of the Supreme Court of Illinois is reported in 393 Ill. 165, 65 N. E. 2d 446, and may be found in the record at pages 4 to 20 of Vol. III.

JURISDICTION.

The opinion of the Supreme Court of Illinois was rendered January 23, 1946. A petition for rehearing was filed to the next (March) term of court and was denied on March 14, 1946 (R. Vol. III, 24) and the judgment sought to be reviewed herein became final. This petition for certiorari is filed within 90 days of the date on which said judgment became final.

The jurisdiction of this court is invoked under section 238 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Section 344), since we complain that the action of the Supreme Court of Illinois in failing to reverse and remand for a new trial for the errors which it admits are in the record, to-wit, denial of the right to put on character witnesses, as guaranteed by the law of Illinois, and the denial of trial by jury as guaranteed by the law of Illinois, violates the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and therefore petitioners are setting up rights, privileges and immunities claimed under the Constitution.

STATEMENT OF THE CASE.

The statement of the case is contained in the annexed petition for certiorari.

BRIEF.

I.

The Due Process and Equal Protection clauses of the Constitution guarantee that all persons accused of crime within the State have the same procedural safeguards for their liberty and demand that the same privileges be accorded these petitioners as are accorded to all other criminal defendants in the State of Illinois.

- Cochran v. Kansas, 316 U. S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453;
Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1065, 30 L. Ed. 220;
Ex Parte Hull, 312 U. S. 546, 61 S. Ct. 640, 85 L. Ed. 1032;
1 Wigmore on Evidence, §§ 55, 56;
Edgington v. United States, 164 U. S. 361, 17 S. Ct. 72, 41 L. Ed. 467;
Cf. Bollenbach v. United States, 90 L. Ed. 318 (1946).

II.

The giving of the prosecution's instruction that the jury are judges of the law and facts denies the right to trial by jury under the law as enunciated by the Supreme Court of Illinois in this and other cases, and is therefore a denial of due process of law and equal protection of the laws under the Fourteenth Amendment. Such an error cannot be held harmless.

- People v. Bruner, 343 Ill. 146, 175 N. E. 400;
Constitution of Illinois, 1870, Art. II, §5;
Bollenbach v. United States, 90 L. Ed. 318 (1946);
Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567.

ARGUMENT.

I.

The Due Process and Equal Protection Clauses of the Constitution Guarantee That All Persons Accused of Crime Within the State Have the Same Procedural Safeguards for Their Liberty.

The Supreme Court of Illinois concedes in its opinion (R. Vol. III, 13) in discussing the failure of the trial court to let petitioner's character witnesses testify, that:

"We think it is clear under the holdings of this court that the trial judge should have permitted the witnesses to answer the questions propounded and that it was error to sustain the objections."

This court said, in *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1065, 30 L. Ed. 220:

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstance, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

In *Cochran v. Kansas*, 316 U. S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453, and again in *Ex Parte Hull*, 312 U. S. 546, 61 S. Ct. 640, 85 L. Ed. 1032, this court held that the due process and equal protection clauses of the Fourteenth Amendment required that a person in prison in a state penitentiary be accorded the same procedural rights to appear in the appellate courts of the state, and in this court, as any other litigant in those courts. In the *Cochran* case *Cochran* sought to have a conviction by a Kansas

Court reviewed on appeal by the Supreme Court of Kansas—a right which any losing party under the law of Kansas had. This Court unanimously held that it was a denial of equal protection of the laws for the State of Kansas to deny Cochran the privilege which it accorded to all other litigants in its Courts. In the Cochran case, Cochran had been found guilty by a jury. His conviction had been sustained by a trial judge of Kansas. The only right which he asked this court to give him was the right to have his case reviewed, a right **which all other litigants in Kansas had.** In our case, petitioners have been convicted by a jury and their conviction sustained by a trial judge. However, the right to adduce evidence admissible under the laws of the state, **which all other criminal defendants in the state are permitted to have go to the jury,** has been denied these petitioners. The Supreme Court conceded in its opinion (Rec. Vol. III, 13) that the law of Illinois permits the introduction of the character evidence which petitioners sought to introduce, just as in the Cochran case it was conceded that all litigants had the right to appeal, but the Supreme Court of Illinois in the opinion in this case, and the trial court by its ruling, in effect denied these petitioners this substantial right just as the prison authorities of Kansas denied Cochran the substantial right of appeal.

The evidence in this case was of a highly circumstantial nature. The only direct evidence of substance in the record is the evidence that Abel Price is and was dead. All other facts by which it was sought to prove the guilt of the petitioners were attempted to be shown by circumstantial evidence. Therefore character evidence was crucial, since we cannot assume that the jury would disregard the testimony of twelve reputable and substantial citizens which would tend to prove that John Fedora and John Laska, the petitioners in this case, are not the kind of men who would rob or murder. It is fundamental that convictions

upon circumstantial evidence should be regarded with a skeptical eye, by the appellate courts, and that any admissible evidence which might give rise to a reasonable and substantial doubt of the guilt of the defendants should be received. We can do no better than the late Dean Wigmore in stating the purpose of character evidence (1 Wigmore on Evidence, § 55, 56):

“A *defendant's character*, then, as indicating the probability of his doing or not doing the act charged is *essentially relevant*.

“In point of human nature in daily experience, this is not to be doubted. The character or disposition—i. e., a fixed trait or the sum of traits—of the persons we deal with is in daily life always more or less considered by us in estimating the probability of his future conduct. In point of legal theory and practice, the case is no different. A defendant is allowed to invoke his own good character to aid in the demonstration of his innocence; . . . The courts have made it clear that a defendant's character is regarded as constantly having probative value on that question. . . .

“§ 56. SAME: DEFENDANT'S GOOD CHARACTER ALWAYS ADMISSIBLE IN HIS FAVOR. Character being thus relevant, it follows that *a defendant may offer his good character* to evidence the improbability of his doing the act charged, unless there is some collateral reason for exclusion; and the law recognizes none such.” (Italics in the text.)

This Court has given a clear expression of the same principle. We think the following language from the opinion in **Edgington v. United States**, 164 U. S. 361, 366, 17 Sup. Ct. 72, 41 L. Ed. 467, is particularly pertinent to this case:

“Whatever may have been said in some of the earlier cases to the effect that good character of the defendant is not to be considered unless the other

evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would **alone** create a reasonable doubt, although without it the other evidence would be convincing."

It cannot be successfully contended that the testimony as to these petitioners' reputation for good character would not have been decisive and effected their acquittal. Thus, for the Supreme Court of Illinois to arrogate unto itself the power to weigh the other evidence, disregarding this character evidence and balance it against the petitioners is a clear invasion of the province of the jury. This court has recently given clear expression of its attitude on this point in *Bollenbach v. United States*, 90 L. Ed. 318 (1946):

"From presuming too often all errors to be 'Prejudicial' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the Appellate Court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

Petitioners are two human beings who have been denied the right to put on evidence of their good character, **which is more crucial in this case than in most criminal cases because of the highly circumstantial nature of all the other evidence** simply because the Supreme Court of Illinois has chosen to judge them instead of letting them be judged

by a jury as are all other litigants in Illinois. This creates, not a uniform procedure, but two different procedures, which is clearly contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

II.

The Giving of the Prosecution's Instruction That the Jury Are Judges of the Law and Facts, Denies the Right to Trial by Jury Under the Law As Enunciated by the Supreme Court of Illinois, in This and Other Cases and Is Therefore a Denial of Due Process of Law and Equal Protection of the Laws Under the Fourteenth Amendment. Such an Error Cannot Be Held Harmless.

The trial court, at the instance of the prosecution gave the jury the following instruction:

"The Court instructs the jury that they are the judges of the law as well as of the facts in the case, and if they can say upon their oaths that they know the law better than the court does, they have a right to do so; but before assuming so solemn a responsibility, they should be assured that they are not acting from caprice or prejudice, that they are not controlled by their wills or their wishes, but from a deep and confident conviction that the court is wrong and that they are right. Before saying this upon their oaths, it is their duty to reflect whether, from their study and experience, they are better qualified to judge of the law, than the court; if, under all the circumstances, they are prepared to say that the court is wrong in its exposition of the law, the statute has given them that right."

In the case of *People v. Bruner*, 343 Ill. 146, 175 N. E. 400, decided February 18, 1931 (five days after the verdict in the case at bar but two days before the filing and three days before the overruling of the motions for new trial in

the Circuit Court in this case) this instruction and the statute of Illinois authorizing the giving thereof, were declared to be unconstitutional and were declared to deny the right to trial by jury, in that at common law the jury were not permitted to judge the law and in that Article II Section 5 of the Constitution of Illinois 1870, prescribes that "the right of trial by jury as heretofore enjoyed shall remain inviolate." In the opinion in this case (Rec. Vol. III, 15) the Supreme Court of Illinois says that although the instruction is and was unconstitutional as denying the right to trial by jury as heretofore enjoyed, that it is harmless error since, although it presents an abstract proposition of law and is therefore objectionable, the rule in Illinois is that such instructions "will not work a reversal unless it can be shown that some harm has been done by it". It is manifest that harm was done by this instruction because this instruction permitted the jury to override all the law in the case—that is the jury could decide (1) that the defendants should not be presumed innocent until they were proven guilty beyond a reasonable doubt; or (2) that the defense of alibi which the defendants set up was not a legal defense; or (3) that the defendants did not need to be proven guilty beyond a reasonable doubt, but only that guilt needed to be founded upon some evidence tending to prove guilt; or (4) that although it had not been proven beyond a reasonable doubt that the deceased died as a result of the acts of defendants (and there was substantial evidence in the record that the deceased might have died from an operation for appendectomy not connected with the shooting) that the defendants could nevertheless be found guilty of murder; or (5) that the testimony of a defendant in a criminal case should not be considered by a jury; or (6) that such evidence was subject to different tests of credibility than the evidence of all other witnesses in the case; or (7) that since the evidence showed the de-

fendants had been drinking beer, that the defendants should be sentenced for that even though there was no evidence of any other offense and no prosecution for drinking beer; or (8) that the evidence of public officials should be accorded more weight than the evidence of other witnesses in the case; or (9) that a conviction for crime on circumstantial evidence should not be predicated only upon evidence of a conclusive nature; or (10) that evidence producing, in effect, a degree of moral certainty that the accused and no one else committed the crime was not required to convict or (11) that such facts and circumstances need not be shown as are consistent with the guilt of the parties charged and as cannot upon any reasonable theory be true and the party charged be innocent or (12) that, even though the evidence might be evenly balanced, the jury could still return a verdict of guilty. In short, all of the safeguards guaranteed to all defendants in criminal prosecutions were nullified by this instruction and the jury was given a roving commission to do whatever it desired without reference to the law. This is contrary to the American system of jurisprudence and contravenes the Fourteenth Amendment to the Constitution of the United States.

The Bollenbach case, which we have cited (*Bollenbach v. United States*, 90 L. Ed. 318 [1946]) requires that guilt be ascertained "by a jury *under appropriate judicial guidance*." (Our italics.) Certainly nothing could be more inappropriate than to create two separate standards of jury trial—one generally applicable to all cases and the other applicable only to cases where the Supreme Court thinks "from the dead record" that the defendants are probably, after all, guilty. We might add in this connection that these petitioners have maintained their innocence, despite the trials and tribulations of fifteen years in prison and despite the fact that they know it is the policy of the Illinois Parole Board not to grant paroles to persons who deny their guilt.

Certainly, if the due process and equal protection clauses require, as they do, that jury panels be drawn from the general citizenry, and specifically as this court has held that Negroes be not deliberately excluded therefrom (*Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567), it must require that once the jury is legally constituted the trial before it be of a uniform procedure in all cases of the same type. Ostensibly the reason for prohibiting the exclusion of Negroes in a jury panel is in order that the jury will not necessarily be made up of men prejudiced against a Negro defendant and to guarantee that the jury will not be one which will allow mere race prejudice to cause it to disregard admissible evidence and the instructions of the court. In this case, we have not a mere chance of personal prejudice against the defendants, leading to a disregard of the instructions but a judicial declaration that the jury may disregard those instructions. Certainly this is prejudicial and it is vain, indeed, for the highest court in Illinois to conclude that that which is patently prejudicial is harmless.

This case has extended the harmless error rule beyond the province of the cases which established it. In the opinion (Rec. Vol. III, 20) the Supreme Court of Illinois relies upon three cases as having established this rule in Illinois. In the first of the cases, *Wilson v. People*, 94 Ill. 299, the error held to be harmless was the alleged inflammatory argument of the prosecutor to the jury in a murder case where the defendant admitted doing the killing but claimed self-defense, after having followed the decedent admittedly for the purpose of administering physical violence to his person, taunting the deceased into striking the first blow, and then killing him. The jury in the *Wilson* case fixed the defendant's punishment at the minimum allowed by the statute—fourteen years—a punishment which can also be inflicted in Illinois for manslaughter or even for assault with intent to commit murder.

The second case relied upon by the lower court is *People v. Haensel*, 293 Ill. 33. The defendant complained there that the prosecution's instructions with regard to the presumption of sanity were repetitious. The court pointed out that there was no substantial evidence whatsoever in the record of insanity, that therefore the trial court should not even have given the defendant's instruction on insanity being a defense, but that such instruction having been given, the curing of that error was harmless.

In the third case, *People v. Cleminson*, 250 Ill. 135, the trial lasted for one whole month. During that month one of the defendant's witnesses was very reluctant to answer some questions. The trial court asked this witness three or four questions, apparently in a hostile manner. The defendant argued in that case that the hostile examination by the trial judge was an indication to the jury of his opinion. We might add that the defendant in that case told three totally inconsistent stories as to how the death of his wife, who had been chloroformed and alongside the corpse of whom the defendant was found lying feigning to be chloroformed, but obviously not suffering from even the slightest whiff of chloroform, occurred. In *People v. Cleminson* three of the seven judges of the Illinois Supreme Court dissented, saying that the majority had gone too far in the application of their harmless error rule.

How far does the due process clause allow this vicious rule to extend? Certainly not to the extent of permitting defendants to be tried and convicted under circumstances which clearly deny them the right to trial by jury, and under circumstances where they, as distinguished from all other defendants, cannot have admissible evidence considered by the jury.

CONCLUSION.

It is respectfully submitted that, for the reasons we have stated, the petition for a writ of certiorari should be allowed as prayed.

Respectfully submitted,

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